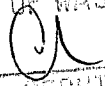


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY


DEPUTY

NO. 48701-2-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
Division II**

ROBERT GUNN, a single man,

Respondent,

v.

**TERRY L. RIELY and PETRA E. RIELY, ET UX ET AL
husband and wife,**

Appellants

APPELANT'S REPLY BRIEF

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ORIGINAL

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SYNOPSIS

In 2010, Gunn filed his Complaint for Timber Trespass and Injunctive Relief to have the Rielys' new well incapacitated. (CP-160; CP-146). Less than two weeks before trial, the parties entered an order dismissing Gunn's claim for injunctive relief against the well. (CP-139). The case went to trial on whether damages would be awarded under the timber trespass statute (RCW 64.12.030), or the statute governing waste or damage to land and property (RCW 4.24.630). (CP-146; CP-160). At trial, the parties stipulated that the value of the damage to the trees was \$153.00. (CP-Ex. 20). Following judgment for Gunn based on RCW 4.24.630, the case was appealed. The judgment was reversed and remanded back to the superior court to determine damages under RCW 64.12.030.¹

At the subsequent rehearing, the remand court awarded the Gunn \$17,500 in attorney's fees on equitable grounds and trebled actual damages of \$153 to \$459 on the timber trespass claim (RCW 64.12.030). However, the damages obtained by the Gunn (even when trebled) were less than the offers of settlement and an offer of judgment submitted to Gunn prior to trial. The remand court denied Reilys' motion to be

¹ Gunn v. Riely, 185 Wn. App. 517, 344 P. 3d 1225 (2015); rev. denied 183 Wn. 2d 1004, 349 P. 3d. 2015)

declared the statutorily prevailing party and for retaxation of costs as authorized by RCW 4.84.250 and CR 68 on the basis that all outstanding trial issues involving both legal and equitable claims were required to be settled so as not to compel Gunn to proceed to trial. (CP-21). The equitable award of attorney's fees and denial of Reilys to be declared the statutorily prevailing party are the subject matter of this current appeal.

ARGUMENT

1. The Findings of Fact and Conclusions of Law Were Based Upon The Trial Court's Erroneous Adoption of RCW 4.24.630 As The Controlling Law At The Urging of the Respondent and Therefore Are The Product of Invited Error.

The trial court acknowledged that Gunn's damage claims of \$153.00 were *de minimus*, but opined that even treble damages of that amount would not provide sufficient damages to cover the factual situation and would be an improper application of RCW 64.12.030. (VRP-337). The problem with the trial court's analysis was that \$153 was all the proof of damages provided at trial. Other than the cutting of the alder saplings in the grassy lane, there was no other evidence of any other damage to Gunn's land. However, Gunn continues to invoke the language of RCW 4.24.630 to support his argument that the actions of the Rielys along the grassy lane were wrongful. All that can really be said was that there was a dispute between neighbors as to the right of use of the grassy path. Gunn

invited the trial court's error in the adoption of RCW 4.24.630 as the controlling statute at trial which was subsequently reversed following the first appeal. That being the case, RCW 4.24.630 cannot be used to further justify the relief granted on remand to Gunn under RCW 64.12.030 not only because of the exclusionary provisions of RCW 4.24.630(2) but also because of the invited error doctrine. The *invited error doctrine* prevents the injustice of a party benefiting from an error that he caused or should have prevented. *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005). rev'd on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *State v. Erickson*, 146 Wn.App. 200, 189 P.3d 245 (2008). In determining whether the doctrine bars relief or review, courts consider whether the party asserting error affirmatively assented to it, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321, 328 (2009); *State v. Barnett*, 104 Wn.App. 191, 200, 16 P.3d 74 (2001). The timber trespass statute of RCW 64.12.030 has no mental intent requirement. Its provisions would apply whether a person's actions were wrongful or negligent.

Gunn argues that the \$17,500 award of attorney's fees was an equitable remedy because the Rielys' actions were "wrongful", and as a consequence of such activity the remand court has broad discretion to fashion such remedies as it deems fair. (Gunn Brief at pages 9-10).

However, Gunn's argument is flawed for the primary reason that actions commenced for money judgments do not constitute equitable remedies. "A money judgment is a legal remedy whereas some other type of court order is equitable." 30A C.J.S. Equity Sec. 1 (2008). Whether the attorneys' fee award is classified as a cost or a damage award, it is a legal remedy and not an equitable remedy.

In the case at hand, cutting of 107 alder saplings within the grassy path (a former logging road) did not cause significant injury or appreciable harm to Gunn's property. However, Gunn wanted to reach other statutory costs allowed by RCW 4.64.630 as recognized in the *Gunn v Riely* at p. 527:

"Beyond the value of the trees, there was no evidence or damages awarded related to waste or damage to the land. The damage fits squarely within the bounds of the timber trespass statute...."

The Division II Court stated, "We determine the proper application of a statute based on carrying out the legislature's intent, not by the desired amount of damages." (citing with approval to *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012).

Riely has previously pointed to the evidence in the record showing that the findings of fact and conclusions of law were in conflict with the trial court's oral opinion. RCW 4.24.630 defines 'wrongful' as acting intentionally and unreasonably while knowing the acts to be unauthorized.

It is premised on the wrongful and unreasonable invasion of the land. See *Clipse v. Michels Pipeline Construction Inc.* 154 Wn. App. 573, 225 P. 3d 492 (2010). However, in interpreting the damage to land statute, the *Clipse* court stated at p. 577,

“There is no way to read "wrongfully" as describing the mere act of coming onto the land. The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land. By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. Presence on the land is required for all three. Thus, wrongfulness cannot refer to the mere act of entry upon the land.”

Gunn promotes a policy argument for an equitable award of attorney fees. However, “A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate.” *Sorenson v. Pyeatt*, 158 Wn. 2d 523, 531, 146 P. 3d 1172 (2006). While Gunn claims that the real injury was more significant than the cut saplings, nowhere in Gunn’s reply brief does he argue that he lacked an adequate remedy at law, nor did he make such an argument at trial court level.

At trial, the findings of fact and conclusions of law were used to support the use of RCW 4.23.630(1). But those findings should be thrown out when erroneous selection of the controlling damages statute at trial is reversed on appeal.

There is an absence of any significant Findings of Fact entered following the remand and the Conclusion of Law is not supported by substantial evidence relating to bad faith on the part of the Rielys. (CP-125 p. 6 lns. 15-21, item #6) To the extent that the remand court viewed the decision to award any attorney's fees to Gunn as a matter of equity or discretion, it abused its discretion and that decision should be reversed.

A judges' discretion can be abused if it is exercised on untentable grounds or for untentable reasons, such as a misunderstanding of the meaning of a statute. *State v. Downing*, 151 Wn. 2d 265, 272-73, 87 P. 3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn. 12, 26, 482 P. 2d 775 (1971)). "Findings of fact are reviewed under a substantial evidence standard, defined as a question of evidence sufficient to persuade a rationale fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn. 2d 873, 879, 73 P. 3d 369 (2003). In this case, the evidence countering the claims of bad faith or wrongful intent was provided by the party's common-grantor, Joel Sisson. His testimony should have been sufficient in and of itself to support the Rielys' affirmative defense of an implied easement despite the omission of

an express reservation of easement providing such right as an encumbrance in Gunn's property deed.²

Sisson testified that it was always the developers' intention of the Storm King Subdivision that the purchasers of Parcels 2 and 3 would have access to their property from the grassy path. (VRP p. 153, ln. 21-25; VRP p. 154, ln. 1-7; VRP p. 154, ln. 13-20) He further testified he later discovered that his attorney who had drafted the easements and maintenance agreements had written the use up for Parcel No. 3 (purchased by the Treerises) but had been inadvertently omitted for Parcel No. 2 (purchased by the Rielys) acknowledging that "someone had dropped the ball".

Contrary to the conclusion of law of willful misconduct on the part of the Rielys, at the close of trial, Judge Taylor stated:

"So, at this point the question arises how Mr. and Mrs. Riely were to know this when it had been represented to them by Mr. Sisson that they had an access easement?...I am satisfied from the testimony that he (Sisson) made that representation. I think that had that not been the case, they would not have had any other reason to think they had the right to use the grassy lane." (VRP Vol. 2, p. 39, lns 9-17).

² "In the event that the Plaintiff establishes trespass on the part of the Defendants, such trespass was casual or involuntary and not willful or reckless, and/or was done with probable cause to believe that defendant's had an interest in the area of the disputed property as envisioned pursuant to RCW 64.12.040 based upon covenants and easements affecting the burdened property. (CP-157; CP-141).

That being the case, if Mr. Riely reasonably believed he was authorized to use the grassy path, he had a common law right to make any necessary improvements and clear the way as it was becoming overgrown by natural foliage to gain access to his property. (VRP p. 84, Ins. 1-13; CP-12 (aerial photograph sequence). The case of *Dreger v. Sullivan*, 46 Wn. 2d 36, 40, 278 P. 2d 647 (1955), held that the owner of an easement by implied grant has the burden of making any necessary improvements to the way.

2. RCW 64.12.030 Does Not Allow For An Attorney's Fee Award in Equity Even If Damages Are Trebled.

The timber trespass statute, RCW 64.12.030 is silent about any award of attorney's fees whether timber is cut in good faith or bad faith. No matter what whether to allow attorneys' fees under that statute is a legislative determination. RCW 64.12.030 has no mental state and applies equally to both intentional or negligent takings, timber cutting, or removal or injury to trees or shrubs on the land of another person. Here, the damage to the Gunn's property (if one disregards the affirmative defense of implied easement) was the damage to his trees to the tune of \$153.00.

As a matter of equity, the remand court allowed Gunn attorney's fees based on the adoption of the trial court's findings and conclusions of

law that the actions of the Riely's were "wrongful". (CP-122-126). However, case law has made it clear that "wrongful" is not the mere act of coming onto to the land. See *Clipse v. Michels Pipeline Construction Inc.*, supra at 577. Equity should not automatically available wherever a party perceives some subjective unfairness (in this case the amount of damages) in the legal outcome. Equity cannot be a basis for awarding attorney's fees unless the cause of action was cognizable in equity. *State v. Sizemore*, 48 Wn. App. 835, 839, 741 P.2d 572 (1987). In the amended complaint, Gunn raised two actions at law, (1) cause of action for timber trespass (RCW 64.12.030) and (2) damages to land (RCW 4.24.630). Since both those claims were actions at law, there were therefore not cognizable in equity.

However, in the remand and in this current appeal, Gunn continues to invite further error. Gunn asserts that he is a "victim" in this case despite the fact that he never accepted the pre-trial RCW 4.84.250 offer of settlement nor the CR 68 offer of judgment. The reason is that Gunn anticipated a financial windfall if he was able to convince the trial court to adopt his statutory interpretation of RCW 4.24.630 which he was able to promote to the trial court.

In point-of-fact, Gunn rejected several higher monetary offers made by the Riely's to compromise and avoid the expense of trial. In

every situation, Gunn coupled contingent acceptance with other monetary or extra-judicial demands which ultimately made compromise unachievable. (CP-24 and Ex. "A" attached). The Rielys did not force Gunn to litigate. The correspondence and e-mail treads evidence several offers of settlement of monetary damages greatly in excess of the formal offers of settlement, i.e. \$5,000 and \$8,500. (CP 23-28).

Nowhere in the reading of RCW 4.84.250 does that statute indicate that its applicability requires the settlement of all claims or theories of recovery. RCW 4.84.250 only has application where a claim is \$10,000 or less. Gunn's recitation of the cases interpreting RCW 4.84.250 is off the mark. Gunn rejected both offers to settlement and judgment on a calculated risk that he would recover a better damage judgment if he took the case to trial.

3. There is no Equitable Basis to Grant Attorney's Fees to the Respondent/Gunn.

Washington case law recognizes four equitable grounds for awarding attorney fees (1) bad faith; (2) preservation of a common fund; (3) to protect constitutional integrity; and (4) private attorney actions. *16 Washington Practice Sec. 5.20*. A further basis for fees can exist under a claim of equitable indemnity "where the acts or omissions of a party to an agreement or event have exposed one to litigation by third-persons not

connected with the initial transaction or event—the allowance of attorney’s fees may be a proper element of consequential damages.” *Blueberry Place Homeowners Ass’n. v. Northward Homes, Inc.*, 126 Wn. App.352, 358, 110P. 3d 1145 (2005).

The “wrongful” conduct entered in support the damage to land statute (RCW 4.24.630) was reversed and any findings of fact and conclusions of law to support RCW 4.12.630 should be non-entities since that statute does not apply. Judge Taylor acknowledged that the Rielys would not have used the grassy path but for the statements attributed to Joel Sisson, one of the parties common-grantors. If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

The Rielys’ actions may have arisen to the standard of negligence, or maybe their right to rely on the verbal statements of the common-grantor, but there was no showing of any malicious intent or bad faith on their part for the court to find willful misconduct. Thus an equitable award for attorney’s fees should not apply.

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4. Doctrine of Merger Does Not Extinguish the Easement Under the Facts of This Case.

Radovich v. Nuzhut, 104 Wn. App. 800 (2001) cited in the Respondent's Brief at page 19 as legal authority of merger to extinguish the easement (implied easement in the matter at hand) does not help Gunn's case. *Radovich* involved an action to quiet title to a parking easement. In its discussion of the doctrines of Merger and Reconveyance, the court there stated:

“As a general rule, one cannot have an easement in one's own property. Where the dominant and servient estates of an easement come into common ownership, the easement is extinguished. This is the rule in Washington. However, *the doctrine of merger is disfavored both at law and in equity, and there are exceptions to its application....*Consequently, the courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons. *Radovich* at p. 805 (citing to *Mobley v. Harkins*, 14 Wn. 2d 276, 282, 128 P. 2d 289 (1942))

The testimony of Joel Sisson was clear that his business partners had intended to grant an easement on the grassy path to the property owners in the subdivision.(VRP- It is undisputed that Sisson granted an easement to Trerises (not parties to this action) that appeared as an encumbrance in the Gunn warranty deed. (VRP p. 73, ll. 6-16) Trerises were owners of Parcel 3 near the terminus of the grassy lane. Gunn was the owner of Parcel 1 and the Reilys were the owners of

Parcel 2 (also near the terminus of the grassy lane.) (RP Vol. 2, p. 33, ll. 1-25). Sisson also testified that he had intended to grant the same express easement to Rielys but the matter had been inadvertently overlooked by his attorney "who had dropped the ball". (VRP p. 154, ln. 13-20; VRP p. 154, ln. 6-21; VRP p. 157, ln. 16-21; VRP p. 158, ln. 3-8).) Based on the undisputed testimony, the conclusion should follow that Sisson never intended a merger or extinguishment to take place.

Gunn knew at the time of acquisition of Parcel 1 that his property was impressed with an express easement in favor of Parcel 3 (Trerise). (VRP p. 122, ln. 1-22, VRP p. 123, ln. 3-4). He also observed the grassy path on his inspection before purchase. (VRP p. 121, ln. 8-18).

"[A] successor in interest to the servient estate takes the estate subject to the easements if the successor had actual, constructive, or implied notice of the easement." *810 Props. v. Jump*, 141 Wn. App. 688, 699, 170 P.3d 1209 (2007). "Termination of easements is disfavored under the law." *City of Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989).

Courts interpret easement grants to give effect to the parties' original intent." *Snyder v. Haynes*, 152 Wn.App. 774, 779, 217 P.3d 787 (2009) (citing *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986)). "What the original parties intended is a question of fact and the legal

consequence of that intent is a question of law." *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

5. Res Judicata Application Not Applicable and Does Not Bar Rielys Implied Easement Claim.

An objection and motion in limine was made by Gunn's trial attorney to prevent establishment of evidence of a quasi-easement to the use of the grassy lane arguing that there was no counterclaim for the establishment of an easement (RP-6, lns 19-25; p. 7, lns 14-22). However, the establishment of an implied easement was central to the affirmative defense against the trebling of damages on the timber trespass claim. (CR-157; CP-141)

Following argument on the issue, the trial judge granted the Gunn's motion in limine and also denied a motion to amend the complaint to put this matter in as a counterclaim. (VRP p. 11, ln 11-15; VRP p. 11, ln. 23).

Res judicata is the rule, not the exception:

"The general doctrine is that the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Schoeman v. N.Y. Life Ins. Co.*, 106 Wash.2d 855, 859, 726 P.2d 1 (1986) (quoting *Sayward v. Thayer*, 9 Wash. 22, 24, 36 P. 966, 38 P. 137 (1894)). However, res judicata does not bar claims arising out of different causes of action, or intend "to deny the litigant his or her day in court." *Shoeman* at 860, 726 P.2d 1.

The threshold requirement of res judicata is a final judgment on the merits in the prior suit. Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and "the quality of the persons for or against whom the claim is made." *Rains v. State*, 100 Wash.2d 660, 663, 674 P.2d 165 (1983).

In *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn. 2d 853, 866, 93 P. 3d 108 (2004) the court stated,

"We first turn to the res judicata requirement of identity of subject matter. This court has held that the same subject matter is not necessarily implicated in cases involving the same facts. See *Hayes v. City of Seattle*, 131 Wash.2d 706, 712, 934 P.2d 1179 (1997) (finding different subject matter in cases involving a master use permit where the initial case sought to nullify the city council decision and the second case sought damages); *Mellor v. Chamberlin*, 100 Wash.2d 643, 646, 673 P.2d 610 (1983) (finding different subject matter in cases involving the sale of property where the initial case sought to establish misrepresentation and the second case sought to establish a breach of the covenant of title).

In *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 860, 726 P.2d 1 (1986), the court held:

Res judicata, or claim preclusion, prohibits the re-litigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Id. Res judicata also requires a final judgment on the merits. Citing to *State v. Drake*, 16 Wash.App. 559, 563-64, 558 P.2d 828 (1976).

The Riley's motion for a continuance to amend the complaint to allege implied easement as a cause of action by way of counterclaim was denied by the trial judge. Case law indicates that the issue is not subject to

res judicata. See for instance, *Taylor v. Bell*, 185 Wn.App. 270, 284, 340 P.3d 951 (2014), review denied, 183 Wn.2d 1012, 352 P.3d 188 (2015) (recognizing that if a party's position is rejected by a court, it is not judicially estopped to rely upon the court's determination in pursuing a different claim thereafter).

As regards the that portion of the affirmative defense based on an express easement, all the *Gunn v. Riley* case did was find that there was no “express easement” to the grassy path. However, the trial court also did not make a final judgment on the merits about an implied easement that may have burdened Gunn’s property. (CP-275; CP-122). Riley was only allowed to use the implied easement as an affirmative defense for purposes of avoiding treble damages under the timber trespass statute.

Res judicata should not be applied in a manner so that a party is deprived of his or her property rights without having his or her day in court. *Meder v. CCME Corp.*, 7 Wash.App. 801, 804, 502 P.2d 1252 (1972), review denied, 81 Wash.2d 1011 (1973).

Gunn’s attorney’s position at trial was that his was a case involving trespass to land, however, he stated “But I would point out that if the Defendants’ are planning to introduce evidence of a history establishing easement, I would say that’s irrelevant because this case is about whether or not they committed trespass, not whether or not they had an easement.” (VRP p. 7, lns. 7-9). Gunn’s trial attorney further asserted

to the court "...this is a timber trespass case basically" (VRP p. 22, ln. 23-23). Even following the trial, both the trial court judgment and remand court judgment each concluded that Gunn's property was only cleared of an "easement of record" (questionable in itself since the lot owners had an easement to get to the primary well in the subdivision). The trial court and the remand did not rule on any implied easement therefore presumably leaving that battle for another day. The Findings of Fact and Conclusions of Law entered following the remand are silent as to the issue of an implied easement. (CR 122-126)

Res judicata does not apply in this case as there was no final judgment on the merits concerning implied easement. Gunn's attorney objected to claim other than for its use of establishing a "good faith" defense to the issue of timber trespass. Res judicata will not operate if a necessary fact was not in existence at the time of the prior proceeding, or if evidence needed to establish a necessary fact would not have been admissible in the prior proceeding. See *Mellor*, 100 Wash.2d at 646, 673 P.2d 610; *Marquardt v. Federal Old Line Ins. Co.*, 33 Wash.App. 685, 689, 658 P.2d 20 (1983); *Meder*, 7 Wash.App. at 806, 502 P.2d 1252.

6. Gunn Refused To Accept the Rileys' Offers Of Judgment and Settlement Given In Advance Of Trial On the Issue of Damages and Therefore It Cannot Be Established That The Litigation was Needless.

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The remand order denying Riely's attorney's fees as prevailing party under RCW 4.84.250 and/or CR 68 should be reversed. Whether a contract or statute authorizes an award of attorney fees is a question of law reviewed de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wash.2d 510, 517, 210 P.3d 318 (2009). In RCW 4.84.250, the key term is "small claim" defined as action for damages of less than \$10,000. RCW 4.84.250 through .290 encourages out-of-court settlements, penalizes parties who unjustifiably bring or resist small claims, and enables parties to pursue meritorious small claims without seeing the award swallowed up by the expense of paying an attorney. *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987).

The case of *Tippie v. Delisle*, 55 Wn.App. 417, 420-21, 777 P.2d 1080 (1989), held that a party who rejects a CR 68 offer and then obtains less than the offer at trial cannot be considered a prevailing party under RCW 4.84.030 (dealing with the recovery of "costs").

The implied easement claim was never settled or resolved as a claim on the merits. Its use was only as part of an affirmative defense for the Rielys. However, even so, such allegation does not involve monetary damages as envisioned by RCW 4.84. 250. Gunn's continues to ignore their promotion of RCW 4.24.630 at trial. By contending to purse this legal theory, the trial was required to go through, in their hopes that they

would recover significantly higher damages. Gunn continues to switch arguments as a matter of convenience to confuse the court or promote the belief that this case was about an easement over his property which it clearly was not. This Court should not be fooled and should recognize that the trial record firmly establishes that Gunn was promoting his damages under RCW 4.24.630 in order to obtain higher damages, costs and attorneys' fees than those provided by RCW 64.12.030. However, the issue in trial was competition of application between RCW 4.24.630 and RCW 64.12.030. The Rielys' use of implied easement as an affirmative defense was to establish to the trial court that they were acting under good faith in order to meet the single damages provision of RCW 64.12.040. To show good faith, they had to allege an implied easement and the common law of the right of maintenance of the pathway across the servient tenement. From the sequence of the aerial photographs admitted in trial, it was obvious that the grassy lane was slowly being overgrown by naturally seed foliage, alders and brush. Gunn never performed any annual maintenance on the grassy path or took any action to make it easier to use. (VRP p. 125, ln. 10-12; VRP p. 125, ln. 21-23).

This is not a case in equity. Gunn's motion in limine restricted the issue of implied easement to the evidence of good faith as regards whether single or treble damages were to be awarded. (RCW 64.12.040). Gunn

conveniently switches his assertion as to the basis of the case as a matter of convenience. At trial, he claimed the case was about timber trespass. On the first appeal, he claims it was to bar the use of the grassy lane although the case centered on the controlling statute of timber trespass or damage to land. RAP 18.1 allows this court to award reasonable attorney fees on appeal where authorized by “applicable law”. Argument and citation to authority are required under the rules to advise the court of the appropriate grounds for an award of attorney fees as costs. *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P. 3d 9 (2012). RCW 64.12.030 does not grant Gunn attorneys’ fees and he has cited no other case law in support of his position. His request for fees should be denied.

Washington has recognized a number of equitable exceptions to the no-attorney-fees rule. A court may grant attorney fees to the prevailing party if the losing party's conduct constitutes bad faith or wantonness. *State ex rel. Macri v. Bremerton*, 8 Wn. 2d 93, 113, 111 P.2d 612 (1941). This exception is not applicable to the present case as the record merely shows a verbal dispute between the neighbors as to the right to use the grassy path and the concomitant right of common law maintenance by the cutting of saplings restricting movement of equipment in the path. Other than that the record is devoid of any bad faith conduct on the part of the

Reilys. See *Public Utility Dist. No. 1 of Snohomish County v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976).

The remand court's finding of find bad faith, willful misconduct or wantonness on the part of the Rielys is not supported by the evidence. The five "confrontations" or meetings over a ten year period concerning a matter of dispute between adjoining property owners as to their legal rights over the grassy path can hardly be considered acts of bad faith, willful misconduct or wantonness. A trial court abuses its discretion when its exercise is based upon untenable grounds. See *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Here, the court abused its discretion. Whether viewed as a damage award or as an award of costs or alternatively as an equitable remedy, the \$17,500 award of attorney's fees to Gunn cannot stand.

The language used in RCW 64.12.030 is unambiguous, and therefore a clear representation of the Legislature's intent. To the extent that the remand court viewed the decision to award any attorney's fees to Gunn as a matter of equity or discretion, it abused its discretion and should be reversed. Discretion can be abused if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the meaning of a statute. *State v. Downing*, 151 Wn. 2d 265, 272-73, 87 P. 3d

(quoting State ex rel. Carroll v. Junker, 79 Wn. 12, 26, 482 P. 2d 775 (1971)).

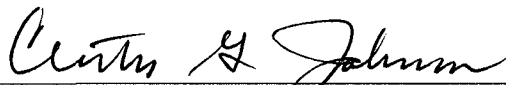
CONCLUSION

Gunn has failed to offer any convincing arguments in response to Rielys' appeal following the remand hearing. The remand court's award of \$17,500 was erroneous since it was not authorized under RCW 64.12.030 and is not supported as a recognized ground in equity.

The phrase "shall" as used in RCW 4.84.250 mandates that the Rielys be awarded their reasonable attorney's fees since the damages awarded to Gunn were less than the amount offered pursuant to the small claims statute and costs should be re-taxed under CR 68.

Respectfully submitted this 8th day of November, 2016.

Law Office of Curtis G. Johnson, P.S.

A handwritten signature in black ink, appearing to read "Curtis G. Johnson", written over a horizontal line.

Curtis G. Johnson, WSBA #8675
Attorney for Appellants/Rielys

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STATE OF WASHINGTON

BY 
DEPUTY

COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

ROBERT GUNN, a single man,

NO. 48701-2-II

Respondent,

v.

PROOF OF SERVICE

TERRY L. RIELY and PETRA E. RIELY,
husband and wife,

Appellants.

I hereby certify and declare that on the 8th day of November, 2016, I served the foregoing *Appellate's Reply Brief* and *Proof of Service* on the following persons/parties, at the following addresses, by the following means:

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ORIGINAL

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of November, 2016, at Port Angeles, Washington

Law Office of Curtis G. Johnson, P.S.

By: 
Sharon R. Rhoads-Warren
Secretary